SUPREME COURT, U. S.

No. 73-650

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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

MAURICE REX, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that he was denied the right to trial by jury and due process of law when the foreman of the jury refused to permit one of the jurors to communicate with the court. There is nothing in the record to support this contention.

Following a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted of conspiring to violate the Federal Firearms Act, 18 U.S.C. 921 *et seq.*, and was sentenced to six months' imprisonment, to be followed by two and a half years' probation. The court of appeals affirmed *per curiam* (Pet. App. A).

During the jury's deliberations, the court received two notes from the jury. One of the notes was from the foreman, requesting to speak to the judge; the other

was from a juror named Cole and contained an inquiry of a legal nature[1] (Tr. 567-568; R. 44). The court replied, in effect, that the jury should read and interpret the charge and review the evidence (Tr. 569-570).

Petitioner points out that another note, which was apparently never transmitted to the court, was filed in the record with a notation, "Note from Juror Countermanded by foreman before Action by Court" (R. 51). The note read:

> Judge—
>
> One of our jury members can not understand the context of Instruction No. 3 on page 9. We have read and reread this to Mr. Cole and he *can not* and *will not* accept the fact that the employees are agents of the corporation and that the corporation is responsible for their criminal actions. We are hopelessly deadlocked.
>
> John M. Clark, Jr., Foreman

The claim based on this third note was raised for the first time in the court of appeals. There was thus no opportunity to determine the precise facts concerning this note, and the issue is not properly before this Court. *United States* v. *Beal*, 404 F. 2d 58 (C.A. 6), certiorari denied, 393 U.S. 1084.

In any event, the record discloses no irregularity. Petitioner contends that this note was an attempt by juror Cole to communicate with the court, and that that

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[1] The note from Cole read:

1. Is the sales Person a Part of a Corporation.

2. and Can the Corporation no [sic] a violation occured [sic] befor [sic] it hapened [sic].

ELMER Cole

attempt was thwarted by the action of the foreman in countermanding the note. By its own terms, however, it was nothing more than a note from the foreman, informing the court that the jury was deadlocked and the reason therefor. The reason for the foreman's action in countermanding the note is obvious—the jury was able to reach a verdict. Mr. Cole did, no doubt, have a question on a legal matter which he desired to communicate to the court, and the record clearly shows that he was allowed to do so (Tr. 567-568; R. 44).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1973.

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